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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 488.

W. F. SNAKARD,

Petitioner,

vs.

FRANKFORT OIL COMPANY,
a division of Joseph E. Seagram & Sons, Inc.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

MATTHIAS F. CORREA,
80 Pine Street,
New York 5, N. Y.
Attorney for Respondent

RICHARD P. LOFTUS,
JOHN W. NIELDS,
WILLIAM A. JANSEN,
80 Pine Street,
New York 5, N. Y.

T. MURRAY ROBINSON,
LEON SHIPP,
Hightower Building,
Oklahoma City 2, Okla.
Of Counsel

November 15, 1960.

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Opinions Below.

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 279 F. 2d 436 and is also annexed as Appendix B to the petition.

The United States District Court for the Western District of Oklahoma rendered judgment without opinion. Its findings of fact and conclusions of law are unreported but are annexed as Appendix A to the petition and are also contained in the printed record at pages 115-21 and 124-26.

Jurisdiction.

The judgment of the Court of Appeals is dated, and was entered on, May 18, 1960.

An extension of time until July 7, 1960 to file a petition for rehearing was granted. The petition for rehearing, applications for rehearing *en banc* and oral argument, and an alternative motion to remand to the trial court for findings or further proceedings, were denied on July 21, 1960.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) (1958).

Questions Presented.

I. May a United States Court of Appeals reverse a United States District Court without remanding the case with instructions to the District Court to make a finding on a matter of fact where no question was raised below in regard to the failure of the District Court to make a finding on the matter, where the finding sought by petitioner would not be supported by the record and would be inconsistent with the findings that had been made by the District Court and left untouched by the Court of Appeals, and where the proposition that the case should be so remanded was fully presented to the Court of Appeals on a petition for rehearing which was denied?

II. Did the Court of Appeals fail to follow Oklahoma law or otherwise fail properly to deal with petitioner's contentions with respect to the fiduciary and other obligations claimed by petitioner to be owing to him by respondent?

Statement of the Case.

In October and November, 1954, petitioner and respondent executed various documents which are annexed to the complaint as Exhibits A-F (Pl. Ex. 1A-1B, R. 18-53, 69, 177, 565, 568; App. 29a-55a[1]). It is undisputed that they constituted in effect a single overall agreement.

In one of these documents, petitioner agreed to assign to respondent a ½ interest in twelve short-term oil and gas leases which petitioner had acquired in Lincoln County, Oklahoma (Finding No. 1, R. 116, App. 1a). The assignment was to be accomplished "forthwith" (R. 49, App. 29a). Respondent agreed to pay $1.00 an acre for its ½ interest (Finding No. 1, R. 116, App. 1a). Respondent also consented to assume half of petitioner's expenses relating to title examinations and curative measures (*ibid.*). Respondent further agreed that a test well would be drilled on the acreage at its sole expense and that petitioner would receive the drilling contract for the test well; the rate at which petitioner was to be paid thereunder was set at approximately twice the customary drilling cost in the area, and was fixed to enable petitioner to make a profit of approximately $20,000 for his work in acquiring the leases (Finding No. 2, R. 116, App. 1a).

Respondent also acquired a right of first refusal to purchase any portion of petitioner's interest which he might thereafter determine to sell (Finding No. 4, R. 116, App. 2a).

The parties further agreed that, if the test well were productive of oil or gas, respondent was to become the

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[1] "R." is used herein to refer to the record as printed for the use of the court below and filed in this Court with the petition for writ of certiorari; "App." is used herein to refer to the appendices annexed to the petition; "P." is used herein to refer to the text of the petition.

operator of the leases (R. 27, App. 39a), under the terms of an attached operating agreement (R. 29-51, App. 41a-73a). The operating agreement as amended provided that production from the leases would be owned between the parties in the proportions of their interests in the leases, which were stated to be a 1/8th working interest for petitioner, and a 7/8ths working interest for respondent until it recouped its drilling costs, at which time respondent was to transfer a 3/8ths working interest to petitioner and each would thereafter own half (R. 27-28, App. 39a-40a; R. 30, App. 43a).

A number of the leases were to expire by their terms on July 1, 1955, but contained drilling clauses (Finding No. 5, R. 116, App. 2a), *i.e.*, the customary provision that commencement of drilling operations would extend them beyond that date.

The District Court (R. 120, App. 6a) and the Court of Appeals (279 F. 2d at 441, App. 21a) agreed that the test well was the only well which respondent had obligated itself to drill by execution of the agreements.

However, the agreements further provided that, after completion of the test well, if either party desired to drill a well upon any of the remaining leases, it was to give written notice to the other, who would then have ten days in which to decide whether to share in the costs of drilling the well (R. 32, App. 45a). If the second party chose to participate, the well was to be drilled for the joint account of the parties and the second party became obligated for half of the drilling costs and entitled to half the proceeds of production (Finding No. 3, R. 116, App. 1a).

If the second party determined not to participate, the first party was at liberty to drill the well at its own cost and expense (R. 32, App. 45a).

Under the terms of the contracts, if petitioner elected not to participate, he was under no obligation to share

the drilling costs and, if the well were a dry hole, the drilling costs would be borne solely by respondent (*ibid.*). If such a well were productive, however, petitioner was to own the same share of production as from the test well, *i.e.*, 1/8th of the working interest until respondent had recouped its costs, and 1/2 of the working interest thereafter (Finding No. 3, R. 116, App. 1a-2a).

In contrast, if respondent elected not to participate and petitioner then drilled a productive well, respondent would have no interest whatever in such well (*ibid.*).

The test well, while not a producer, indicated that the area was potentially productive (Finding No. 6, R. 117, App. 2a). A second well, designated the Erwin No. 1, was then drilled and was completed as a producer in February, 1955 (Finding No. 9, R. 117, App. 3a).

By this time relations between petitioner and respondent had become strained. In part this had resulted from the commencement of a suit against petitioner by one Burkett who claimed an interest in the leases which petitioner had agreed to assign to respondent (Finding No. 7, R. 117, App. 2a; R. 421-23). Pending the outcome of this litigation, respondent withheld a portion of the funds due petitioner (*ibid.*).

In addition, despite the contractual requirement that petitioner assign a 1/2 interest in the leases to respondent "forthwith" (R. 19, App. 29a), petitioner had refused to execute such assignments except as to leases on which respondent drilled a well (Finding No. 23, R. 120, App. 6a; R. 423-24). Respondent's interest in such other leases was therefore unrecorded and unprotected. Respondent continued to press petitioner for such assignments and petitioner persistently refused (R. 424, 433). On March 8, 1955, respondent, on the advice of counsel, filed of record a "caveat" which referred to the contracts, described the

leases covered by the contracts and asserted that respondent had a 7/8ths working interest in these leases (Finding No. 12, R. 117-18, App. 3a; Pl. Ex. 19, R. 15-16, 177, 589).

The effect of the caveat was to inform the world of respondent's interest in the leases and as a corollary to prevent petitioner from representing to those who might otherwise be interested in working the leases with him that he had an unencumbered right to contract with them so far as working interests in the leases were concerned.

At no time did petitioner take any steps to have the caveat stricken from the record, other than to include in the general prayer for relief in this action a plea for judgment "quieting title on the leases" (R. 18, 69).

The producing well, the Erwin No. 1, was located in the west central portion of the lease area (Pl. Ex. 7, R. 666. 915). Respondent had substantial geological information which indicated the desirability of drilling to the south (Finding No. 16, R. 118, App. 4a). Respondent also had geological information which indicated the desirability of drilling to the northeast (Finding No. 22, R. 119, App. 5a; R. 335, 345, 349-50, 405, 447-48).

M. R. Shaffer, respondent's general manager during this period and until the termination of his employment in August, 1956 (R. 325-26), concluded that it was preferable to drill to the north and east. He thereupon undertook an extensive drilling program to the north and east of the Erwin No. 1 well, drilling six additional wells at a cost to respondent of several hundred thousand dollars (R. 329-35, 650). One was a producer; four were non-commercial producers; one was a dry hole (Findings Nos. 20-22, R. 119, App. 5a; R. 329-35).

Early in the course of this drilling program, the Inland Oil Company proposed to Shaffer a "farm-out" to itself of portions of the leases to the south, *i.e.*, the Thomas and

Christian leases[1] (R. 331; Pl. Ex. 17-B, R. 177, 586-87; Finding No. 10, R. 117, App. 3a). Under the terms of this proposal, Inland was to drill at its sole expense a test well on each of those leases (Pl. Ex. 17, R. 177, 583-85). Had the wells been dry holes, Inland would have borne the loss itself (*ibid.*). Had the wells been producers, Inland would have received half of the working interest in eighty acres of the Thomas lease and in forty acres of the Christian lease; respondent and petitioner would have divided the remaining half equally between them (*ibid.*). This proposal was acceptable to Shaffer (Finding No. 10, R. 117, App. 3a). Petitioner, however, rejected it, restating his belief that the best drilling prospects lay in those leases and demanding that respondent pay him an additional $90,000 to join in the arrangement[2] (R. 155-58, 179). This respondent refused to do.

On July 1, 1955, the date on which the Thomas and Christian leases were to expire if drilling operations were not commenced, petitioner, without notice to respondent in violation of the terms of the contracts, commenced drilling operations thereon (Finding No. 26, R. 120, App. 6a; R. 104-05, 696).

Petitioner continued drilling operations on the Christian lease until after the caveat had been released with respect to that lease by an instrument dated March 12, 1956, filed April 19, 1956 (R. 100, 104, 220; Pl. Ex. 28, R. 168; R. 631, 712).

Petitioner continued drilling operations on the Thomas lease through the greater part of 1956, and, in October, 1956, completed a producing well on this lease, which, peti-

[1] It is for the loss of the Thomas and Christian leases, by virtue of petitioner's failure to continue drilling operations thereon or sale of his interest therein, that this suit seeks damages.

[2] Previously, Inland had unsuccessfully offered $100,000 for petitioner's interest in the entire lease block (R. 145-46; Finding No. 10 R. 117, App. 3a).

tioner testified, was "the best well in the field" (R. 104-06, 709). The caveat had been released with respect to that lease by an instrument dated February 6, 1956 (Pl. Ex. 27-A, R. 168, 629).

Respondent did not acquire any interest (other than as provided in the agreement with petitioner) in the Thomas or Christian leases or in any other leases covered by the agreement with petitioner (Finding No. 27, R. 120, App. 6a).

Argument.

The decision of the District Court was based upon the conclusions (a) that respondent had breached its contractual obligations to petitioner by failing to drill certain leases which it had elected to drill and by filing the caveat reflecting its interest in the leases involved (Conclusions of Law Nos. 4 and 5, R. 120-21, App. 7a), and (b) that respondent had breached its fiduciary obligations to petitioner by not sufficiently revealing its geological information, by overreaching petitioner by misrepresentation in connection with the proposed farm-out, and by unwarrantedly claiming it 7/8ths interest in a lease through the filing of the caveat (Conclusion of Law No. 6, R. 121, App. 7a).

The decision of the Court of Appeals was based upon the conclusions that the pertinent relationships between the parties were fully comprised in the multiple agreement between them, and that respondent had acted well within the terms of this agreement, stating in the concluding sentence of its opinion, "We can neither rewrite the contracts for the parties nor protect Snakard from the results of the contracts which he made." (279 F. 2d at 445, App. 23a) Accordingly, the decision of the District Court was "reversed with directions to enter judgment in favor of defendant Frankfort." (*Ibid.*)

The central questions raised on this petition for certiorari—the collateral claim of malice in filing the caveat and the claim of violation of fiduciary obligations under Oklahoma law—were fully presented to the Court of Appeals on petition for rehearing, together with the claim that the case should be remanded for a further finding on malice. The petition was denied.

I.

The Court of Appeals properly reversed without remanding for further findings.

The petition for certiorari (P. 25-26) claims in one breath that the District Court made a finding of malice, in the next that the Court of Appeals should remand so the District Court could make such a finding, and in the next that the Court of Appeals has usurped the function of the District Court by making a finding of no malice.

The record on the point is as follows.

Conclusion of Law (*not Finding of Fact*) No. 5 of the District Court says:

> "If, in fact, the defendant did not intend to elect to drill all these undeveloped leases at the time of the caveat filing, such filing was a deliberate, unjustified assertion of interest in these leases which prevented plaintiff from successfully taking action to develop some or all of these leases prior to their expiration, a right plaintiff held under the terms of the contract.
>
> Whether defendant improperly clouded plaintiff's title to coerce plaintiff into approving the controverted farm-out, or for some other reason not apparent in the record is immaterial. This was an act contrary to defendant's rights under the agreement

and encroached upon plaintiff's contractual rights, separate and apart from the fiducial relationship." (R. 121, App. 7a)

The Court of Appeals said:

"Snakard contends that Frankfort slandered his title by filing the caveat for record. A lawyer for Frankfort testified that he filed the caveat to protect Frankfort's interests because Snakard had not executed all of the lease assignments to which Frankfort was entitled. The caveat referred to the 1954 contracts, described the leased land, and claimed a ⅞ interest in the leases for Frankfort. The agreements themselves could have been filed. The caveat is no more objectionable than the agreements, except for the claim of a ⅞ interest. By the contracts, as to all wells after the first, Frankfort, in wells in which Snakard elected not to participate, had a ⅞ interest until reimbursed up to 200% of Snakard's share of the drilling costs. Thus, in some instances, Frankfort's interest was ⅞ and in some ½.

The Oklahoma rule is that the principal element in a suit for slander of title is malice. By filing the caveat Frankfort was asserting an interest in the properties under its contracts with Snakard. It had a right to do this unless it was actuated by some wrongful motive which would establish malice. The question of malice is for the trier of the facts. The case at bar was tried to the court and the court made no finding of malice. No question is raised by Snakard in regard to the omission of such finding. It follows that the judgment cannot be sustained on the theory of slander of title." (279 F. 2d at 443, App. 24a) (Footnotes omitted)

Thus, it is entirely clear that the District Court made no finding of malice and that the Court of Appeals clearly recognized that the making of findings was for the District Court and did not usurp that function.

Furthermore, the findings of fact which were made by the District Court conclusively establish the absence of malice.

The Court of Appeals upheld the findings of the District Court in full. It vacated none of them, expressly or impliedly. It had before it a record sufficient to enable it finally to dispose of the case. The findings as entered by the District Court were even expressly approved by the attorney for petitioner (R. 126, App. 14a).

The findings of the District Court in this case, which the Court of Appeals openly accepted and on which it rested its opinion, fully meet the test of the cases cited by petitioner, *e. g.*, *Kelley* v. *Everglades Drainage District*, 319 U. S. 415. They establish beyond a doubt that no malice was involved in the filing of the caveat by respondent.[1]

Under Oklahoma law concerning slander of title by assertion of a claim to another's property, malice is held to exist only where defendant has asserted a claim in which he has no reasonable basis for belief. If defendant is acting in good faith, there is no recovery, *Ward* v. *Mid-West & Gulf Co.*, 97 Okla. 252, 223 Pac. 170 (1923).

Here the findings of the trial court demonstrate that respondent had ample justification for its action in filing the caveat. Assignments of a ½ interest in the leases, for which respondent had paid in advance, were long overdue yet petitioner was still persistently refusing to execute them (Finding No. 1, R. 116, App. 1a; Finding No. 23, R. 120, App. 6a; R. 423-24, 433). Respondent's ½ interest therefore lay at the mercy of petitioner, unrecorded and completely unprotected against third parties. Equally unrecorded and

[1] The test of the adequacy of findings is not, as petitioner would contend, whether there is a finding on each and every possible point, but whether the findings when viewed as a whole are sufficient to indicate the basis of a decision.

unprotected was respondent's right of first refusal in the event of sale of petitioner's ½ interest (*ibid.*). And petitioner's rights in the leases were already under attack in the litigation brought by Burkett (Finding No. 7, R. 117, App. 2a; R. 421-23).

Respondent therefore determined to protect its interest. In pursuance of that determination, and pursuant to advice of counsel, it filed the caveat (Finding No. 12, R. 117-18, App. 3a; Pl. Ex. 19, R. 15-16, 177, 589). That document referred to the contracts, described the leases, and warned any purchaser that respondent claimed a ⅞ths interest in the leases (*ibid.*).

Although the courts below have suggested that the caveat may have misstated respondent's interest in the leases by claiming a ⅞ths interest rather than a ½ interest (279 F. 2d at 443, App. 24a; R. 121, App. 7a), the contract involved gave respondent a present ⅞ths interest, subject to reduction to a ½ interest either by petitioner's election to participate or by respondent's recoupment of drilling costs from petitioner's proportionate share if petitioner chose not to participate (R. 27-28, App. 39a-40a; R. 30, App. 43a). Only in the event that petitioner made the original decision to drill a particular lease would respondent's initial interest have been less than a ⅞ths working interest. However, petitioner had informed respondent that he had no intention of doing so (R. 434). In any event, it is not contended that any claimed injury to petitioner arose from this difference in fractions.

The District Court found that the caveat had been filed "pursuant to advice of counsel" (Finding No. 12, R. 117-18, App. 3a). In fact, the Court of Appeals noted, "a lawyer for Frankfort testified that he filed the caveat [himself] to protect Frankfort's interests because Snakard had not executed all of the lease assignments to which Frankfort

was entitled.'"[1] (279 F. 2d at 443, App. 24a; R. 437) It has never been suggested that the lawyer's advice or action was given or taken in other than good faith.

This in itself is sufficient to establish that respondent acted without malice. *New England Oil & Pipe Line Co.* v. *Rogers*, 154 Okla. 285, 7 P. 2d 638 (1931). That opinion, after stating in the passage quoted by petitioner (P. 38-39) that a presumption of malice might be drawn in certain circumstances, also pointed out that other circumstances could rebut the presumption:

> "'To rebut evidence of malice defendant may show that he was advised by counsel, upon a fair representation of his claim, as to the course to be pursued in the protection of its rights. It must appear, however, that the defendant truthfully disclosed to his counsel all the material facts within his knowledge.'" (7 P. 2d at 643)

No contention is made here that respondent withheld any information from its counsel, whom the District Court called respondent's "attorney and active representative" (Finding No. 15, R. 118, App. 4a; R. 425).

Obviously, instead of the caveat, the contracts themselves could have been filed. They were not filed because of their bulk (R. 437). The caveat merely gave notice of the underlying contracts, as petitioner's attorney recognized[2] (R. 580-81). Petitioner is seeking to build a cause of action on the filing of the caveat which he would not have had if the agreements had been filed; although the effect upon him would have been the same.

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[1] Petitioner's point (P. 30-31) that the issue of malice depended on an assessment of the credibility of witnesses is not well taken. The testimony concerning respondent's reasons for filing the caveat was undisputed.

[2] During the entire period in which the caveat was on file, petitioner took no legal steps to have it stricken, although he was presumably in constant contact with his lawyers because of the several lawsuits in which he was then engaged (R. 180, 421, 733).

The foregoing makes it crystal clear that not only did the District Court fail to make an express finding of malice, but that it could not have done so in harmony with its other findings. Such a finding, if made, would have had to have been vacated by an appellate court.[1]

It is also to be noted that petitioner has failed to select any evidence from the record which he thinks would support a finding of malice; nor has he referred the Court to any offers of relevant evidence which were rejected.

It is only by making the untenable assertion that a specific finding containing the term "malice" one way or another is necessary to the final disposition of this case that petitioner can build the asserted "conflict" with other circuits. An examination of the cases cited at pages 26-30 of the petition discloses that none of them lends support to the contention petitioner makes here.

In *Paramount Pest Control Service* v. *Brewer*, 177 F. 2d 564 (9th Cir. 1949), the District Court had made detailed findings of fact and conclusions of law. They were accepted by the Court of Appeals and the decision of the lower court was affirmed. In *Helfer* v. *Corona Products, Inc.*, 127 F. 2d 612 (8th Cir. 1942), the District Court had entered neither findings of fact nor conclusions of law; however, the Court of Appeals was able to "infer" the amount of damages from the master's report and the District Court's opinion and it directed entry of that amount as final judgment.

In *Burrell* v. *Martin*, 232 F. 2d 33 (D. C. Cir. 1955), the Civil Service Commission had failed to make an essential

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[1] The Court of Appeals did not reverse judgment below because petitioner had failed to request any particular finding as contended by petitioner (P. 35-37). The Court of Appeals must have simply concluded that petitioner had tried his case to his satisfaction and was satisfied with the findings that were made. Otherwise the record would disclose some objection, and as set forth above, the findings of fact which were made adequately covered the point and conclusively rebut any malice.

finding of fact in a loyalty investigation; summary judgment reversing the Commission's order ousting the plaintiff from her civilian position with the Army was therefore directed.

In seven other cases, the District Court had made no findings of fact at all; its decision was therefore reversed and the case was remanded for findings. In one case[1] the District Court had not even written an opinion from which the Court of Appeals could deduce the grounds of its decision. In another[2] there was a memorandum opinion of the District Court but no facts were set out in it. In the other five decisions[3] there is no mention of even a memorandum opinion below.

In the balance of the cases cited by petitioner, the District Court had either made separate findings of fact[4], or had stated them in the course of its opinion[5], but had done so inadequately and had failed to determine the factual issues which the Court of Appeals found critical.

Petitioner also cites (P. 29) *United States* v. *Horsfall*, 270 F. 2d 107 (10th Cir. 1959), as an asserted illustration of the claimed practice of the Court of Appeals for the Tenth

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[1] *Fletcher* v. *Fletcher*, 219 F. 2d 768 (D. C. Cir. 1955).

[2] *Hook* v. *Hook & Ackerman, Inc.*, 213 F. 2d 122 (3d Cir. 1954).

[3] *Hopkins* v. *Wallin*, 179 F. 2d 136 (3d Cir. 1949); *Winter Park Telephone Co.* v. *Southern Bell Tel. & Tel. Co.*, 181 F. 2d 341 (5th Cir. 1950); *Victory Towing Co.* v. *Bordelon*, 219 F. 2d 540 (5th Cir. 1955); *Bach* v. *Friden Calculating Mach. Co.*, 148 F. 2d 407 (6th Cir. 1945); *Kweskin* v. *Finkelstein*, 223 F. 2d 677 (7th Cir. 1955).

[4] *Stella* v. *Graham-Paige Motors Corp.*, 232 F. 2d 299 (2d Cir. 1956), *cert. denied*, 352 U. S. 831; *Hunter* v. *Scruggs Drug Store, Inc.*, 113 F. 2d 971 (4th Cir. 1940); *Indemnity Ins. Co.* v. *Midwest Transfer Co.*, 184 F. 2d 633 (7th Cir. 1950); *Irish* v. *United States*, 225 F. 2d 3 (9th Cir. 1955); *Deering-Milliken & Co.* v. *Modern-Aire of Hollywood, Inc.*, 231 F. 2d 623 (9th Cir. 1955); *Campbell* v. *Campbell*, 170 F. 2d 809 (D. C. Cir. 1948).

[5] *United Shoe Mach. Corp.* v. *Kamborian*, 160 F. 2d 461 (1st Cir. 1947); *City of Sumter* v. *Spur Distributing Co.*, 110 F. 2d 649 (4th Cir. 1940).

Circuit of supplying omitted findings on essential issues of fact. That was a personal injury action in which the District Court had awarded plaintiff $17,550 for future loss of time and $45,000 for permanent disability. Since there were no special findings concerning permanent disability, the Court of Appeals found it reasonable to assume that the lower court had included lost earnings in the award for permanent disability, and there was a duplication. Alternatively, if the lower court had intended the award for loss of time to cover a period of temporary total disability it was without support in the record; if the award for permanent disability were intended to supplement lost earnings, it was excessive. The court accordingly directed that plaintiff remit $17,550 of the judgment or submit to a new trial on the issue of damages.

It is apparent that petitioner's attack on that case is simply an attack on the practice of remittitur, which practice is long established in personal-injury actions in the federal courts, *Dimick* v. *Schiedt*, 293 U. S. 474, 482-85.

The foregoing also disposes of petitioner's contention that the Court of Appeals failed to follow the case law of Oklahoma by ignoring "the plain meaning of the trial court's findings and conclusions" (P. 37). As has been demonstrated, the findings of fact of the District Court were precisely the basis on which the Court of Appeals did rest its decision. Those findings clearly established the absence of malice under Oklahoma law, *New England Oil & Pipe Line Co.* v. *Rogers, supra; Ward* v. *Mid-West & Gulf Co., supra.*

The *New England* decision holds, in effect, that the advice of counsel is a "justifiable motive" within the meaning of section 1445 of Title 12 of the Oklahoma statutes, relied on by petitioner (P. 38). That statute provides a presumption of malice only in the absence of such a motive.

Petitioner also asserts that "a general finding for plaintiff in a slander of title action amounts to a finding of malice. . . ." (P. 37) However, there was no such general finding by the District Court in this case. Petitioner tried his case, not as a slander of title action, but on the theory of a breach of contract, and damages were assessed on that basis (R. 122, App. 8a; R. 125, App. 11a). Even on that theory, the specific findings established that respondent acted without malice in filing the caveat. The case cited by petitioner, *Wilkerson* v. *Wasson*, 110 Okla. 66, 235 Pac. 206 (1924), does not aid him. There was no general finding in that case from which malice could be implied. To the contrary, the Oklahoma court found that the defendant had not acted in good faith but had filed the disputed document solely for purposes of extortion.

Finally, in the light of petitioner's full presentation to the Court of Appeals in its petition for rehearing of the very arguments with respect to malice now advanced in its petition for certiorari, it can be concluded that the Court of Appeals fully considered the matter and decided on the entire record before it that nothing would be gained by remand, *i.e.*, that no finding of malice could be supported.

II.

The Court of Appeals properly dealt with Oklahoma law and with the asserted fiduciary and other obligations of respondent.

Petitioner complains (P. 39-42) that the Court of Appeals failed to follow Oklahoma law in assessing the obligations toward each other of petitioner and respondent. Petitioner asserts that the following is the law of that state:

> "Joint venturers are fiduciaries and owe each other the utmost good faith." (P. 40)

This is exactly what the Court of Appeals found to be the applicable law:

> "The relationship so created was fiduciary in character and required the utmost good faith on the part of both parties." (279 F. 2d at 443; App. 25a)

The Court of Appeals also recognized that the scope of any obligation, including a fiduciary obligation, cannot be determined *in vacuo*. Accordingly, it went on to note that:

> "The extent and effect of such relationship is determined by the written agreements between the parties defining and delineating the powers and rights of each. In such a situation it is presumed that they delegated all the powers they wished to confer upon each other and withheld all powers or authority not affirmatively delegated. The relationships between them are controlled by the terms of their agreements voluntarily made." (*ibid.*) (Footnotes omitted)

The conclusion of law (*not Finding of Fact*) of the District Court with respect to the asserted fiduciary obligations of respondent reads as follows:

> "Moreover, defendant Frankfort breached its fiducial duty owed plaintiff by failing to fairly and openly reveal the geological information it possessed directly bearing on the agreement's subject matter, by overreaching plaintiff in connection with the proposed farm-out to Inland in affirmatively misrepresenting the location of the second Wilcox producing structure, and by unwarrantedly claiming a 7/8ths interest in this lease block through the caveat placed of record on March 8, 1955." (Conclusion of Law No. 6; R. 121, App. 7a)

The Court of Appeals dealt with the subject matter of this conclusion of law most carefully and most fully (279 F. 2d at 443-45, App. 25a-28a).

The Court of Appeals held that respondent did not breach any fiduciary duty to petitioner with respect to the geological information it possessed (a) because respondent had no contractual obligation to divulge that information, (b) because the record showed that petitioner had his own opinion as to the significance of matters of geological information, which opinions were different from those of respondent, and (c) accordingly, petitioner could neither have been misled nor overreached.

The Court of Appeals held that petitioner had not been overreached in connection with the proposed farm-out to Inland (a) because as stated above petitioner had his own geological conclusions, and (b) because of his own volition he elected not to pursue them at that time, although given an opportunity to do so.

The Court of Appeals held that respondent did not breach any fiduciary duty to petitioner in filing the caveat, both for the reasons set forth in Point I above and because respondent had a clear right to give notice of its interest in the property.

In this branch of the argument, petitioner is simply complaining that the Court of Appeals reversed the District Court on the conclusions to be drawn from the record as a whole. If this sort of action on the part of the Court of Appeals is to be ground for review by this Court by petition for certiorari, this Court would have to review virtually every case in which a Court of Appeals reverses a District Court.

Petitioner's final argument (P. 42-45) appears to complain of the fact that nobody below considered the case on the legal theory that an intentional injury was inflicted upon him by respondent "without just cause and excuse."

No such theory was advanced to the District Court and no such theory was advanced to the Court of Appeals, either

in connection with the argument of the appeal or in the petition for rehearing. .

Furthermore, as petitioner's argument discloses, the theory seems to be inexplicably intertwined with a "malicious wrong", and, in any event, the subject matter of this theory is fully disposed of by the opinion of the Court of Appeals.

Conclusion.

The decision of the Court of Appeals was based on findings of fact made by the District Court and left undisturbed by the Court of Appeals, and on an accurate application of the relevant law of Oklahoma. No issue is tendered which is appropriate for consideration by this Court. It is submitted that the decision below was in all respects correct and that the petition for writ of certiorari should be denied.

Respectfully submitted,

MATHIAS F. CORREA,
80 Pine Street,
New York 5, N. Y.
Attorney for Respondent.

RICHARD P. LOFTUS,
JOHN W. NIELDS,
WILLIAM A. JANSEN,
80 Pine Street,
New York 5, N. Y.

T. MURRAY ROBINSON,
LEON SHIPP,
Hightower Building,
Oklahoma City 2, Okla.
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 488

W. F. SWAKARD, *Petitioner*,

v.

FRANKFORT OIL COMPANY, a division of Joseph E. Seagram & Sons, Inc., *Respondent*.

REPLY

PEYTON FORD
1000 Connecticut Ave., N. W.
Washington, D. C.
Attorney for Petitioner

Of Counsel:

FORD, LARSON, GREENE
AND HORAN
Washington, D. C.

JOHN B. DUDLEY, JR.
DUDLEY, DUDLEY & DUDLEY
Oklahoma City, Oklahoma

CLYDE J. WATTS
LOONEY, WATTS, LOONEY
& NICHOLS
Oklahoma City, Oklahoma

P. D. ERWIN
Chandler, Oklahoma

PETERS PRINTING CO., BYRON S. ADAMS, WASHINGTON, D. C.

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